A2i Co Ltd v MiTV Corp Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D6–22–1867 OF 2006
NALLINI PATHMANATHAN J
27 OCTOBER 2010

Contract — Breach of contract — Specific performance — Termination of letter of intent — Whether tenable — Quantum of damages — Appropriate assessment

Contract — Breach of contract — Termination — Letter of intent ('LOI') — Defendant refused or failed to respond to plaintiff's queries — Whether defendant prevented plaintiff from performing its obligations — Whether evinced intention not to perform its obligations — Whether amounted to termination of LOI — Whether plaintiff entitled to treat contract as discharged or elected to rescind — Contracts Act 1950 s 54

The plaintiff, a company incorporated and registered in Korea, was in the business of developing what are known as decoders or 'set-top boxes' ('STBs'). In essence, these devices are boxes that translate data, for the present purposes in the form of movies or television programmes, into audio and video form to decoders used in most Malaysian households. Meanwhile the defendant was in the business of, inter alia, broadcasting pay television, providing of broadband network services, multimedia interactive television broadcasts and its related services. The dispute between the plaintiff and the defendant arose as a consequence of an agreement between them for the provision of the plaintiff's STBs for use in the defendant's broadcasting business. The parties executed a letter of intent ('LOI') whereby the plaintiff agreed to undertake the development, supply, delivery and provision of services for basic internet protocol STBs for the defendant. The defendant undertook to purchase and pay for a minimum order of 100,000 units of the STBs, subject to the plaintiff passing acceptance tests and there not being any unauthorised delay in the project. Nevertheless, there were delays incurred beyond the datelines set in the LOI. However, from the exchange of correspondence between the parties as well as the minutes of the progress meetings, notwithstanding the delays, the parties carried on with the performance of this contract. By reason of the unreasonable delay, the defendant terminated the LOI in or around August 2006. Prior to this however, on 1 August 2006 field trial testing commenced with the delivery by the plaintiff of 80 units of STBs. Fifteen of these 80 units were empty casings. It was after the commencement of these field trial tests that matters became less clear. There was no correspondence on this issue of termination. Accordingly, the plaintiff instituted its claim against the

defendant seeking, inter alia, specific performance or damages in lieu thereof. The issues that arose for consideration were as follows: (i) whether the defendant terminated the LOI; (ii) if there was no termination of the LOI, what were the consequences vis-a-vis the plaintiff and the defendant; and (iii) if there was a termination of the LOI, then was it a valid termination in all the circumstances of the case.

Held, allowing the plaintiff's claim for damages with costs:

(1) There was no termination of the LOI as of 16 August 2006. Neither did the defendant even evince an intention to terminate as of that date, in view of the contemporaneous documents which showed that field tests continued. This was further fortified by a second email dated 11 September 2006 where once again, the defendant's representative in response to a query by PW2 about field trial status advised PW2 to liaise with one Shahrim on the details pertaining to these field tests. It therefore followed that as of 11 September 2006, the parties were still carrying out field trial tests, and therefore the LOI could not have stood terminated as of this date either (see paras 43–45).

(2) Given the conclusion that there was no oral termination of the LOI at the meetings of 16 August or 15 September, coupled with the subsequent conduct of the defendant in refusing or failing to respond to the plaintiff's queries on the field tests in order to further perform its obligations under the LOI, it was clear that the defendant did not intend to continue with its obligations under the LOI. The defendant's intention not to be bound by the LOI became irrevocable and crystal clear when a change in technology was announced in detail to the public. Again, there was no word in writing to the plaintiff to the effect that the LOI stood terminated neither the reasons for the same. This amounts to a clear and unambiguous assertion by the defendant that it was no longer bound to perform its obligations under the LOI. The conduct of the defendant amounted to a clear breach on its part (see para 50).

(3) By virtue of the renunciation of the LOI by the defendant, in accordance with s 54 of the Contracts Act 1950, the plaintiff was entitled to treat the contract as discharged or elect to rescind the same, and make claim for such loss which it had sustained as a consequence of the non-performance of the contract by the defendant. In this context, it is relevant that s 54 applies equally to a failure or neglect or default in carrying out obligations under the contract, in as much as an act of direct or forcible prevention does (see para 53).

(4) As the defendant had prevented the plaintiff from performing its obligations under the LOI, the plaintiff was entitled to compensation from the defendant for the loss thereby suffered. The appropriate mode of assessment of the quantum of damages payable by the defendant to the

plaintiff was to be on a quantum meruit basis. As the issue of damages was not fully addressed and ventilated at trial, and further, in order to ensure that the quantum awarded to the plaintiff was commensurate to the loss it had suffered, the court ordered that damages to be assessed by the learned senior assistant registrar as soon as practicable. This will enable a more realistic estimate of the actual loss suffered to be computed. The plaintiff's claim for specific performance was however not tenable in this case and was therefore dismissed (see para 58).

[Bahasa Malaysia summary

Plaintif, sebuah syarikat yang diperbadan dan didaftarkan di Korea, menjalankan perniagaan membentuk apa yang dikenali sebagai dekoder atau 'set-top boxes' ('STB'). Pada asasnya, peranti-peranti tersebut adalah kotak-kotak yang menterjemahkan maklumat, bagi tujuan semasa dalam bentuk wayang atau program televisyen, kepada bentuk audio dan video ke dekoder-dekoder yang digunakan di kebanyakan isi rumah Malaysia. Manakala defendan menjalankan perniagaan, antara lain, menyiarkan televisyen berbayar, memberikan khidmat rangkaian jalur lebar, penyiaran televisyen multimedia interaktif dan khidmatnya yang berkaitan. Pertikaian antara plaintif dan defendan timbul akibat daripada perjanjian antara mereka bagi peruntukan STB plaintif untuk digunakan dalam perniagaan penyiaran defendan. Pihak-pihak telah menyempurnakan satu surat kuasa ('SK') di mana plaintif bersetuju melaksanakan pembentukan, pembekalan, penghantaran dan peruntukan untuk perkhidmatan bagi protokol internet asas STB untuk defendan. Defendan telah berjanji untuk membeli dan membayar untuk pesanan minimum 100,000 unit STB itu, tertakluk kepada plaintif berjaya dalam ujian penerimaan dan tidak ada apa-apa kelewatan yang tidak dibenarkan dalam projek itu. Walau bagaimanapun, kelewatan telah berlaku melebihi tarikh akhir yang ditetapkan dalam SK itu. Namun begitu, berdasarkan surat menyurat antara pihak-pihak dan juga minit-minit mesyuarat yang dijalankan, pihak-pihak telah terus melaksanakan kontrak ini. Oleh sebab kelewatan yang melampau, defendan telah menamatkan SK itu dalam atau sekitar 1 Ogos 2006. Walau bagaimanapun sebelum itu, pada 1 Ogos 2006, ujian percubaan telah bermula dengan penghantaran 80 unit STB oleh plaintif. Limabelas daripada 80 unit tersebut merupakan sarung yang kosong. Hanya selepas bermulanya ujian percubaan tersebut perkara menjadi kurang jelas. Tiada surat menyurat tentang isu penamatan ini. Oleh demikian, plaintif telah memulakan tuntutannya terhadap defendan memohon, antara lain, pelaksanaan spesifik atau ganti rugi sebagai ganti. Isu-isu yang timbul untuk dipertimbangkan adalah seperti berikut: (i) sama ada defendan telah menamatkan SK itu; (ii) jika tiada penamatan SK itu, apakah akibat dalam hubungan plaintif dan defendan; dan (iii) jika terdapat penamatan SK itu, maka adakah ia satu penamatan yang sah berdasarkan keseluruhan keadaan kes.

Diputuskan, membenarkan tuntutan plaintif untuk ganti rugi dengan kos:

(1) Tidak terdapat penamatan SK setakat 16 Ogos 2006. Defendan juga

tidak menunjukkan niat untuk melakukan penamatan pada tarikh tersebut, berdasarkan dokumen-dokumen semasa yang menunjukkan bahawa ujian masih diteruskan. Ini selanjutnya diperkukuhkan oleh e-mel kedua bertarikh 11 September 2006 di mana sekali lagi, wakil defendan yang menjawab persoalan oleh PW2 tentang status percubaan itu menasihatkan PW2 menghubungi Shahrim tentang butir-butir berkaitan ujian-ujian tersebut. Adalah diikuti bahawa sehingga 11 September 2006, pihak-pihak masih menjalankan ujian percubaan tersebut, dan oleh itu SK itu tidak mungkin ditamatkan pada tarikh tersebut (lihat perenggan 43–45).

(2) Dengan membuat kesimpulan bahawa tiada penamatan secara lisan tentang SK itu di mesyuarat-mesyuarat pada 16 atau 15 September, beserta dengan perlakuan selanjutnya oleh defendan yang enggan atau gagal menjawab soalan-soalan plaintif tentang ujian-ujian tersebut bagi tujuan meneruskan pelaksanaan tanggungjawabnya di bawah SK itu, adalah jelas bahawa defendan tiada niat untuk meneruskan tanggungjawabnya di bawah SK. Niat defendan untuk tidak terikat oleh SK itu menjadi suatu yang tidak boleh ditarik balik dan amat jelas apabila pertukaran teknologi disiarkan secara terperinci kepada orang awam. Sekali lagi, tiada apa-apa secara bertulis kepada plaintif untuk membuktikan bahawa SK itu telah ditamatkan mahupun apa-apa alasan untuknya. Ini membentuk penegasan yang jelas dan tak taksa oleh defendan bahawa ia tidak lagi terikat untuk melaksanakan tanggungjawabnya di bawah SK itu. Perlakuan defendan membentuk pelanggaran yang jelas di pihaknya (lihat perenggan 50).

(3) Berikutan penolakan SK oleh defendan, menurut s 54 Akta Kontrak 1950, plaintif berhak menganggap kontrak itu sebagai pelepasan atau memilih untuk membatalkannya, dan membuat tuntutan untuk kerugian yang dialaminya akibat daripada kontrak yang tidak dilaksanakan oleh defendan. Dalam konteks ini, adalah relevan bahawa s 54 juga terpakai terhadap kegagalan atau kecuaian atau keingkaran melaksanakan tanggungjawab di bawah kontrak, sepertimana dalam perlakuan langsung atau pencegahan secara terpaksa (lihat perenggan 53).

(4) Oleh kerana defendan telah menghalang plaintif daripada melaksanakan tanggungjawabnya di bawah SK itu, plaintif berhak mendapat pampasan daripada defendan kerana kerugian yang dialaminya. Cara penaksiran kuantum ganti rugi yang sesuai yang perlu dibayar oleh defendan kepada plaintif adalah berdasarskan kuantum meruit. Oleh kerana isu ganti rugi tidak dikemukakan dan dibicarakan secara menyeluruh semasa perbicaraan, dan selanjutnya, bagi tujuan memastikan kuantum yang diawardkan kepada plaintif setimpal dengan kerugian yang dialaminya, mahkamah memerintahkan agar ganti rugi ditaksirkan oleh penolong

kanan pendaftar secepat yang dapat dilaksanakan. Tuntutan plaintif untuk pelaksanaan spesifik bagaimanapun tidak boleh dipertahankan dalam kes ini dan dengan itu telah ditolak (lihat perenggan 58).]

Notes

For cases on specific performance, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2769–2770.

For cases on termination, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2779–2783.

Cases referred to

Haji Hasnan v Tan Ah Kian [1963] MLJ 175, CA (refd)
Muralidhar Chatterjee v International Film Co Ltd AIR 1943 PC 34 (refd)
Planche v Colburn (1831) 8 Bing 14 (refd)
Smith Construction Ltd v Phit Kirivatna (f) [1955] MLJ 8 (refd)
Tan Hock Chan v Kho Teck Seng [1980] 1 MLJ 308, FC (refd)

Legislation referred to

Contracts Act 1950 s 54

Max Yong (Kinu & Yong) for the plaintiff.
R Thayalan (R Thayalan) for the defendant.

Nallini Pathmanathan J:

[1] The plaintiff is a company incorporated and registered in Korea. It is in the business of developing what are known as decoders or 'set-top boxes'. In essence these devices are boxes that translate data, for the present purposes in the form of movies or television programmes, into audio and video form to decoders used in most Malaysian households. These set-top boxes will be referred to in short as 'STBs'.

[2] It is pertinent to note that the plaintiff's STBs support the broadcasting of programmes via the internet as opposed to broadcasting via satellite. This internet protocol based STBs developed by the plaintiff can be utilised via an internet connection rather than the installation of a satellite dish.

[3] The defendant on the other hand is in the business of, inter alia, broadcasting pay television, providing of broadband network services, multimedia interactive television broadcasts and its related services.

[4] The dispute between the plaintiff and the defendant in this case arose as a consequence of an agreement between them for the provision of the plaintiff's STBs for use in the defendant's broadcasting business. After the requisite

preliminary proposals, the parties executed a letter of intent dated 28 January 2006 ('LOI') whereby the plaintiff agreed to undertake the development, supply, delivery and provision of services for basic internet protocol set-top boxes (STBs) for the defendant. The defendant undertook to purchase and pay for a minimum order of 100,000 units of the STBs, subject to the plaintiff passing acceptance tests and there not being any unauthorised delay in the project. The acceptance tests would set out the functionalities that the STBs had to comply with. The salient provisions of the LOI provide as follows:

> Clause 2 — The Purchaser undertakes to purchase and pay for 100,000 units ('Minimum Order'), of the STBs at an agreed unit price of USD 98.80 … failing which the Vendor reserves all rights to institute legal proceedings and claim for damages. The Minimum Order is subject to the fulfilment by the Vendor of their undertakings in Clause 6. Purchaser shall commence placing the orders from the date of Final Acceptance as stated in Clause 6.3.
>
> Clause 6
>
> 6.1 …
>
> 6.2 In the event of unauthorised delay in the delivery of the Trial STBs or where the Trial STBs have failed any of the acceptance tests carried out by the Purchaser by 30 May 2006, then the Purchase shall be under no obligation whatsoever to place the Minimum Order. Criteria for the acceptance tests shall be mutually agreed by the Purchaser and the Vendor by 31 March 2006 having regards to the functionalities stated in Clause 6.3.
>
> 6.3 The Trial STBs for final acceptance ('Final Acceptance') must conform to the STBs functionalities as stipulated in the Specifications for Basic STB dated 22 November 2005 by the Purchaser.
>
> 6.4 …
>
> 6.5 …
>
> 6.6 In the event of failure by Vendor to comply with the above said undertakings then the Purchaser shall have the option to terminate this LOI and/or be entitled to cancel any remaining balance of the Minimum Order and the Purchaser reserves all rights to institute legal proceedings and claim damages.

[5] The plaintiff proceeded with its obligations under the LOI by, inter alia, sending two software engineers from Korea to Malaysia to specifically undertake the project and work with its Malaysian agent and counterpart, one Spiral Circuit Sdn Bhd to ensure performance. The parties progressed with the development of the STBs. There are minutes of the progress meetings held periodically showing that there was continuous and constant monitoring and modification of the STBs. Several versions were produced and improved on the basis of feedback received from the defendant.

[6] There were delays incurred beyond the datelines set in the LOI. However it would appear from the exchange of correspondence between the parties as well as the minutes of the progress meetings, that notwithstanding these delays, the parties carried on with the performance of this contract. In other words, strict compliance with the dates stipulated in the LOI appear to have been waived. However it is pertinent to note that the defendant maintains that it subsequently terminated the LOI in or around August 2006 by reason of unreasonable delay.

[7] Prior to this however, on 1 August 2006 field trial testing commenced with the delivery by the plaintiff of 80 units of STBs. Fifteen of these 80 units were empty casings. It is after the commencement of these field trial tests that matters become less clear.

[8] The dispute begins with events occurring from 16 August 2006 onwards. The defendant through its sole witness, its chief executive officer, one Mr Ho Meng, DW1 ('DW1') claims that on that date, he had a meeting with the plaintiff's chief executive officer, one Hong Hyun Mok, PW1 ('PW1'). DW1 alleges that he told PW1 that the delays in the development of the STBs was unacceptable and that he would have to, and then proceed to, terminate the LOI verbally. PW1 on the other hand maintains that there was no oral termination of the LOI on that day. He accepts that DW1 stated that the defendant was considering a change of technology from the plaintiff's technology to a different technology, MPEG4. PW1 maintains that when he heard this, he met up with and discussed the matter with the defendant's chairman, one Dato' Rosman Ridzwan, who assured him that the defendant would continue with the plaintiff's technology.

[9] DW1 further testified that one month later, on 15 September 2006 at a meeting held with one Max Tan and Victor Ho for the plaintiff and one Freddy Phang and himself for the defendant, the plaintiff was once again verbally told that the LOI stood terminated. DW1 stated that he 'confirmed the termination' of the LOI which had been initially advised in August 2006. Both Max Tan ('PW2') and Victor Ho ('PW3'), who testified at trial, stated that while they could recall attending the meeting on 15 September 2006 they could not recall what was discussed but were certain that termination was not discussed because that was a matter of such crucial importance that they would have remembered the communication of such a drastic decision on the part of the defendant. There is no correspondence on this issue of termination.

[10] Thereafter the plaintiff wrote to the defendant on 9 October 2006 stating that it had not received any results or reports on the field test trials. The plaintiff sought a meeting with the major shareholder of the defendant for further directions or further steps from DW1 to progress the project further.

The plaintiff received no response to this and wrote a reminder on 18 October 2006. Again they received no response. By this stage no further exchange had taken place between the parties in relation to further modification or improvement of the latest version of firmware provided by the plaintiff to the defendant.

[11] Then on 31 October 2006 the defendant issued a press release announcing a change in technology from that provided by the plaintiff, namely video codec to the new technology called MPEG4/H.264. It will be recalled that PW1 testified that he had, about two months prior to this, on 17 August 2006, asked the defendant's chairman Dato' Rosman Ridzwan whether there was any change in the technology to be used by the defendant and had been assured that there would be no such change. In their press release (which was not in dispute and produced in court) the defendant had stated that the switch of technology platform would enhance its business plans in that it expected these STBs to be cheaper.

[12] After this the plaintiff instituted its claim against the defendant seeking, inter alia, specific performance or damages in lieu thereof. This then comprises a summarisation of the background facts giving rise to this claim.

ISSUES

[13] The issues that arise for consideration are as follows:

(a) did the defendant terminate the letter of intent dated 28 January 2006;

(b) if there was no termination of the letter of intent, what are the consequences vis a vis the plaintiff and the defendant; and

(c) alternatively, if there was a termination of the LOI, then was it a valid termination in all the circumstances of the case.

[14] It follows from the foregoing formulation that depending on the outcome of issue (a) either issue (b) or (c) will be redundant.

Issue (a): did the defendant terminate the letter of intent dated 28 January 2006?

[15] This issue requires a study and evaluation of the competing testimonies from witnesses for the plaintiff and that of the defendant. Each of the witness's testimonies will be considered in turn.

[16] PW1 testified that he was only present at the meeting of 16 August 2006 ('the first meeting'). He was not present at the 15 September 2006 meeting('the second meeting'). PW1 gave evidence relating to the progress of

the project from its inception. He explained that after the signing of the LOI, two software engineers were sent from Korea to undertake the project. To facilitate the implementation of the contract, the plaintiff entered into a licence agreement with an entity from Norway for the security software for smart cards to be used in the STBs. They also entered into a contract with another entity for the joint development of the software for the STBs. For this joint development two engineers from Korea were sent to Kuala Lumpur for four months. They also confirmed an order for 100,000 units of STBs with a company in Taiwan. According to PW1, the plaintiff incurred approximately USD1,471,511.87 in relation to the development of these STBs.

[17] PW1 went on to explain that the delays that resulted in the performance of the contract beyond the dates set out in the LOI arose by reason of matters beyond the control of parties. However he maintained that both the plaintiff and the defendant had by conduct, mutually agreed to the extension of time for compliance. The causes for the delay according to him, included a delay in the procurement of approval from the standards body, SIRIM, as well as the constant and continuous modification of requirements by the defendant. He further explained that the SIRIM approval was of crucial importance as it was required prior to the STBs being assembled, so as to ensure that all electrical and electronic safety requirements had been complied with, as these STBs were envisioned for domestic use throughout Malaysia. Accordingly the datelines set in the LOI were not adhered to. Notwithstanding this, the defendant, as late as 22 August 2006 continued to acknowledge the progress of the trial field test and also acknowledged receipt of an improved software version.

[18] As for the meeting on 16 August 2006, PW1 maintained that he did meet with DW1. In examination-in-chief he denied that at the meeting on 16 August 2006, DW1 had stated that such delay had caused irreparable damage and that the defendant was terminating the LOI. In cross-examination it was put to PW1 that at the meeting on 16 August, DW1 told him that the delay and failure to develop the firmware to achieve satisfactory functionality had resulted in losses to the defendant. PW1 denied the same. It was then put to him that at that same first meeting, DW1 indicated to him that a change of technology might have to be made as a result of the plaintiff's failure to develop the STBs. Again PW1 denied this. When asked however whether DW1 informed him of the possibility of a change of technology, PW1 answered that this was true. This is consonant with his examination-in-chief where he testified that he had a meeting with the chairman of the defendant, Dato' Rosman Ridzwan to ascertain whether the defendant intended to effect a change in the technology base to be used, namely to change to MPEG4/H.264. PW1 maintained that he was assured by the said Dato' Rosman that there would be no change in technology. Again there is correspondence (as referred to above) dated 22 August 2006, after the date of the first meeting which

discloses that the parties were still exchanging reviews on the functionality of the STBs, and more significantly, accepting improved versions of the software for further review.

[19] At the close of re-examination, in response to a question by the court as to what precisely took place at the first meeting, PW1 testified that DW1 on behalf of the defendant told him that the defendant might change the video codec from the current technology of Windows Media View 9, to MPEG/H.264, but that no mention was made of the termination of the letter of intent. The effect of changing the technology would be to make the plaintiff's STBs redundant because these STBs do not support the proposed technology. PW1 maintained that DW1 did not tell him why they were going to change technology. When asked what his response was, he replied that ' … We were embarrassed by the possibility of the change of video codec so we visited the Chairman of the defendant the very next day'. At the meeting he testified that they were informed that there would not be any change of the video codec.

[20] The other two witnesses for the plaintiff, Tan Lye Meng, Max, PW2 (PW2) and Ho Victor, PW3 (PW3) were not present at the first meeting and could therefore shed no light on this matter.

[21] DW1 in relation specifically to the issue of the meeting with PW1 on 16 August 2006, stated that he informed PW1 that the plaintiff had failed to develop the firmware that was required. This failure to supply the STBs has caused irreparable damage to the defendant's business as the defendant still could not launch the service despite contracting with the plaintiff since January 2006. And because of the failure to improve on these major defects, DW1 maintained that he told PW1 that ' … we have no option but to terminate the LOI'. DW1 further added that PW1 was aware that the defendant was looking at the MPEG/H.264 codec technology which is the European standard.

[22] When asked whether the contract was terminated as of that date, DW1 stated that he advised PW1 that the LOI would have to be terminated. He said he effectively communicated that the LOI would have to be terminated and because of that, PW2 and PW3 wanted to see him on 15 September 2006. He went on to explain that that was why he had to bring in his board member, Freddy Pang, so that there would be no argument or dispute at the meeting over the LOI and acceptance by the plaintiff.

[23] When asked when the defendant had first considered using the alternative technology, DW1 responded that the defendant had had significant problems with the plaintiff's technology and considered using the European technology in July or August 2008.

[24] Moving on to the second meeting on 15 September 2006, DW1 explained that it had been in a meeting adjacent to his meeting room. DW1 testified that he explained the same thing that he had explained to PW1 on 22 August 2006. He confirmed the termination of the LOI to SP2 and SP3. When asked what words were used by him he said: ' … I would have used the same words. I would have told them the problems we have and that the plaintiff is unable to improve. Because of the delay in firmware we had to discontinue the field trial …'

[25] In the course of cross-examination, DW1 was also asked as follows:

Q: On 16 August 2006 there was no termination of the LOI.

A: The words used would be 'I would have to terminate'.

Q: What was your intention?

A: To terminate. The timing is crucial. Those four weeks are crucial.

Q: On 16 August 2006 you informed Mr. Hong (PW1) that you intend to terminate. Was it your intention to terminate on 16 August 2006 or not?

A: Yes.

…

Q: So on 15 September 2009 you confirmed the termination?

A: Yes.

[26] In summary therefore DW1 testified that at the first meeting he indicated the intention to terminate the LOI, which he subsequently confirmed at the second meeting on 15 September 2006. This is somewhat consistent with the defendant's pleadings at paras 10–11 where the defendant stated:

(10) At the meeting held on 16 August 2006, between Mr. Hong Hyun Mok the Chief Executive Officer of the plaintiff and Mr. Ho Meng, the Chief Executive officer of the defendant at the defendant's office, Mr. Ho Meng conveyed to the plaintiff that the plaintiff's failure to develop and supply the STBs had caused irreparable damage to the defendant's business …

(11) During the meeting on 16 August 2006, Mr. Ho Meng also informed Mr. Hong Hyun Mok that the defendant would have to terminate the Letter of Intent because of the plaintiff's prolonged delay and failure to fulfil its undertakings under the Letter of Intent. Mr. Ho Meng further informed Mr. Hong Hyun Mok that due to the plaintiff's prolonged delay and failure to fulfil its undertakings the defendant planned to switch over to the MPEG4 technology.

(15) Mr. Ho Meng, the Chief Executive Officer of the defendant, had on 15 September 2006, during the meeting attended by Mr. Freedie Phang a director

of the defendant, and Mr. Max Tan and Mr. Victor Ho of Spiral Circuit Sdn. Bhd., the plaintiff's agent, informed the plaintiff of its failure to develop and supply STBs that conforms to the Specifications for Basic STBs dated 22 November 2005, required by the defendant and terminated the Letter of Intent pursuant to Clauses 6.2 and 6.6 thereof.

[27] In stark contrast to the evidence of DW1 with regards to the second meeting on 15 September 2006, PW2 and PW3 strongly maintained that termination was not the subject matter of discussion at the second meeting where they were present. These two witnesses were not present at the first meeting on 16 August 2006, only at the second meeting.

[28] Their evidence was brief but firm. This is what SP2 said in evidence in chief:

Q: Did the defendant notify the plaintiff or Spiral Circuit Sdn. Bhd. of any failure of the trial field test, acceptance tests or final acceptance test?

A: No, the defendant never indicated nor informed the plaintiff or Spiral Circuit Sdn. Bhd. that the set top boxes failed the field tests as both parties have been making progressive improvements.

Q: Did the defendant at anytime through one Mr. Ho Meng inform Spiral Circuit Sdn. Bhd. that the defendant intends to or has terminated the Letter of Intent dated 26 January 2006?

A: No, the defendant did not at any time, inform me and/or anyone from Spiral Circuit Sdn. Bhd. that the Letter of Intent dated 26 January 2006 had been terminated or was about to be terminated.

Q: Did the defendant inform you orally at a meeting on 15 September 2006 that the Letter of Intent dated 26 January 2006 was terminated?

A: No.

[29] In the course of cross-examination on the issue of the second meeting, PW2 stated as follows:

Do you remember the meeting of 15 September 2006?

A: As I mentioned I can't recall the date but I recall the meeting.

Q: During that meeting on 15 September 2006, Ho Meng did inform you that the LOI has to be terminated as a result of the plaintiff's failure to develop and supply the STB that conforms to the plaintiff's requirements.

A: No.

[30] At the end of re-examination, the court asked PW2 some questions as follows:

Court: Can you tell us what happened at the meeting on 15 September 2006?

A: I can't really quite remember. We sat down and talked with regards to the progress of the boxes.

Q: How long was the meeting?

A: I can't recall. I am sure that termination was not material because such an event I would have remembered.

[31] In short, PW2 was unable to recollect precisely what was discussed at the meeting, save that it was generally with regards to the progress of the meeting but that termination was definitely not discussed.

[32] PW3, Ho Victor, gave similar evidence. He testified that he was present at the second meeting, but could not recall Mr Ho Meng stating that the letter of intent stood terminated. In cross-examination he testified as follows:

Q: Can you tell us what transpired at the meeting on 15 September 2006?

A: I am not very sure but I remember the people in the meeting.

Q: I put it to you that you can't even remember that Ho Meng did inform you that the LOI was terminated?

A: Termination is a serious matter. I would have recalled that it was said if it had been discussed.

Q: What was discussed?

A: I can't remember. It was four years ago.

[33] In re-examination, PW3 explained that nearly the entirety of Spiral Circuit's business, ie the agent of the plaintiff, centred on the LOI. Accordingly, if termination had been mentioned he maintained that he would have known about it as it would have had catastrophic consequences for them.

[34] From the foregoing it is equally clear that PW3 strongly refutes any suggestion of a termination of the LOI as of the second meeting on 15 September 2006. The evidence on behalf of the plaintiff and the defendant is therefore sharply contradictory in that the plaintiff's witnesses maintain that at both meetings there was no mention of a termination of the LOI, while the defendant's witness maintains that there were detailed discussions on the need to discontinue the project and terminate the LOI.

[35] I have observed and considered the evidence and demeanour of PW1, PW2, PW3 and DW1. The plaintiff's witnesses came across as witnesses of truth who clearly and simply stated what they knew and what they did not know. They were categorical about the lack of discussion of a termination. I

considered the fact that both PW2 and PW3 stated that they could not recall the contents of the conversation at the second meeting, save that no issue of termination came up. As suggested by learned counsel for the defendant, how could they be sure that termination was not discussed if they could not recall what was discussed at that meeting? However, bearing in mind the fact that the second meeting was one of many meetings between the parties, and that this event took place some four years ago, it is not surprising that witnesses might well have difficulty recalling precisely what was discussed at a business meeting unless it was of primary importance. In other words, it appeared to me credible that PW2 and PW3 would not recall very much about the meetings given that, as far as they were concerned, nothing of great significance was discussed.

[36] As for the first meeting on 16 August 2006, PW1 was clear, direct and precise in his answers. He conceded that the possibility of a change of technology was discussed but not termination. Again I found his evidence to be credible.

[37] Moving on to DW1, he too was clear and precise in his answers. He was able to give a detailed account of what he had said on both occasions, notwithstanding that these events took place four years ago and there was nothing in writing to assist him in his recollection. His narration of events was comprehensive. He came across as a meticulous and careful witness and his evidence was in keeping with the pleadings in the defence. If anything, I found his evidence surprising in that he was able to recollect matters in, such detail. However given the nature of his oral evidence, I found it surprising that he had failed to:

(a) put down any of his dissatisfaction with the plaintiff's progress of the project in writing;

(b) accord the plaintiff reasonable notice of his intention to terminate; and

(c) confirm the termination in writing, given the magnitude of the project and the existence of the LOI.

[38] However notwithstanding this, it was difficult for this court to assess on the basis of the oral evidence alone, who was telling the truth. The balance fell in favour of the plaintiff's witnesses for the reasons above in (a), (b) and (c). I also accepted that given that the project comprised a crucial part of the plaintiff's business, any such oral termination would have elicited a strong response from them seeking to persuade the defendant otherwise.

[39] More importantly, the correspondence prevailing at that time comprises evidence pertaining to the relationship between the parties at that

time. It amounts to a contemporaneous record of matters, as opposed to the oral evidence of the witnesses some four years later after the institution of this suit.

[40] After the first meeting on 16 August 2006, there is correspondence between the defendant's technical representative, one Evany Eduna and PW2 dated 22 August 2006. By this e-mail, the defendant's representative sends to the plaintiff a software review for engineering software version 0.9.3. It states that while there were significant improvements seen, there were still functional problems subsisting. The defendant also acknowledged receipt of a more updated version of software, namely M11 software and states, somewhat tellingly, that this newest version is 'currently under test and will be broadcasted once test is completed, earliest today'.

[41] Annexed to this email was a detailed review of the various functionalities of the STBs.

[42] This email emanating from the defendant therefore shows that software testing or review was still taking place and envisaged to continue as of 22 August 2006. If indeed the defendant had really terminated the LOI as of 16 August 2006 or indicated that it was going to do so in the very near future, why then would such correspondence continue between the parties? Why would testing and review continue? The only conclusion that can reasonably be drawn is that as of 22 August 2006, the LOI did not stand terminated and field tests continued.

[43] Therefore I find that there was no termination as of 16 August 2006. Neither do I find that the defendant even evinced an intention to terminate as of that date in view of the contemporaneous documents which show that field tests continued.

[44] I am further fortified by a second email dated 11 September 2006 where once again, the defendant's representative in response to a query by PW2 about field trial status advises PW2 to liaise with one Shahrim on the details pertaining to these field tests. She goes on to state the defendant's expectations with regards to the next software release. In other words, once again there is no mention of a cessation of field trial tests, merely that the next version should be better, which indicates that testing and the project as a whole was still subsisting and continuing as of that date. And this is a mere four days prior to the second meeting.

[45] It therefore follows that as of 11 September 2006, the parties were still carrying out field trial tests, and therefore the LOI could not have stood terminated as of this date either.

[46] Can it then be said that termination was finally effected on 15 September 2006? It is indeed true that after 11 September 2006 there appears to be no correspondence from the defendant to the plaintiff. This could well indicate a hiatus or cessation in the relationship. But the issue here is whether the defendant did indeed communicate such termination in a reasonable manner with sufficient notice, given the nature and magnitude of this project.

[47] Again the fact that the plaintiff wrote to the defendant on 9 October seeking feedback on the field tests and following up with a further letter a week later seems to indicate that the plaintiff was not aware of any such termination. If indeed the termination had been effected and accepted by the plaintiff as testified to by DW1, why then would the plaintiff write not one, but two letters seeking feedback from the defendant on the project? More significantly why did the defendant remain so deafeningly silent? It would be reasonable to expect the defendant to have responded by stating that the LOI stood terminated in view of the termination at the meeting on 15 September 2006. The reasons for the termination, namely the unsatisfactory delays and lack of functionality of the STBs could also have been made clear. But the defendant did none of these things. Instead, it maintained a complete silence and ignored all the pleas of the plaintiff. Then without further communication it announced in some detail to the world at large through a press release that it was effecting a change of technology. The defendant's course of conduct as of mid-August can therefore be seen to be consistent. It maintained a complete silence and then simply changed technology. As a consequence the plaintiff was effectively disabled from being able to perform its obligations under the LOI. Given the totality of the evidence which I have considered in detail above, I conclude that the plaintiff's version of events is considerably more credible. The defendant's version of events lacks credibility because:

(a) The contemporaneous documents at around that time do not disclose an intention to terminate.

(b) There does not appear to have been any reasonable notice to terminate accorded to the plaintiff.

(c) The LOI envisages that all notices to be sent to either party ought to be in writing and sent by registered post. This clause therefore envisages that matters of importance, which would include termination, ought to be in writing and issued by prepaid registered post. This was not done.

(d) The detailed and meticulous account given by DW1 is not entirely credible given the lack of any written documents and the fact that this event took place more than four years ago.

(e) The lack of response and silence of the defendant in the face of letters written by the plaintiff seeking feedback further suggests that there was no oral termination as is now alleged.

(f) The subsequent issuance of a press release about a change of technology in some detail to the world at large, exhibits a wholly cavalier attitude towards the LOI and the defendant's relationship and contractual obligations to the plaintiff thereunder.

[48] For these reasons I accept the plaintiff's version of events and find that there was no termination of the LOI as of the first meeting on 16 August 2006 or the second meeting on 15 September 2006.

[49] By reason of this conclusion, it is not necessary for me to consider issue (c). Instead, issue (b) falls for consideration:

Issue (b): If there was no termination of the letter of intent, what are the consequences vis-a-vis the plaintiff and the defendant?

[50] If indeed there was no termination as of 15 September 2006, the LOI continued to subsist. However it is equally clear from the conduct of the defendant, in first refusing to respond to the plaintiff's written queries on 9 October and 16 October, and thereafter going on to announce a change of technology vide a detailed press release, that the defendant by its conduct evinced an intention not to perform its obligations under the LOI. Given the conclusion above, namely that there was no oral termination of the LOI at the meetings of 16 August or 15 September, coupled with the subsequent conduct of the defendant in refusing or failing to respond to the plaintiff's queries on the field tests in order to further perform its obligations under the LOI, it is clear that the defendant did not intend to continue with its obligations under the LOI. That the defendant had evinced an intention no longer to be bound by the LOI became irrevocable and crystal clear when a change in technology was announced in detail to the public, yet with no word in writing to the plaintiff to the effect that the LOI stood terminated and the reasons for the same. This amounts to a clear and unambiguous assertion by the defendant that it was no longer bound to perform its obligations under the LOI. The conduct of the defendant amounts to a clear breach on its part.

[51] What then is the consequence vis-a-vis the plaintiff in the face of a unilateral but clear and unequivocal renunciation of the LOI by the defendant? Is it open to the plaintiff to treat itself as discharged or is it a breach warranting an appropriate sanction sounding in damages? On the facts of the instant case, there can be no doubt that the plaintiff was entitled to treat itself as discharged from the further performance of its duties under the LOI as, in the face of a change in technology there was no reasonable manner in which it could continue to perform its duties under the LOI. It is evident that the non-performance of the defendant's obligations under the LOI so as to enable the plaintiff to complete the field tests, amounted to a breach of the LOI which

substantially deprived the plaintiff of the whole benefit of the LOI. The evidence of renunciation is clear from the public announcement relating to the change in technology.

[52] Section 54 of the Contracts Act 1950 sets out the relevant position in law:

> When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract …

[53] Accordingly by virtue of the renunciation of the LOI by the defendant, in accordance with s 54, the plaintiff is entitled to treat the contract as discharged or elect to rescind the same, and may make claim for such loss which it has sustained as a consequence of the non-performance of the contract by the defendant. In this context it is relevant that s 54 applies equally to a failure or neglect or default in carrying out obligations under the contract, in as much as an act of direct or forcible prevention does (see *Sinnadurai, Law of Contract*, (3rd Ed)). In the Indian case of *Muralidhar Chatterjee v International Film Co Ltd* AIR 1943 PC 34, the Privy Council stated as follows:

> … Under s 53 (s 54 of the Malaysian Act), if one party prevents the other from performing his promise, 'the contract becomes voidable at the option of the party so prevented', and the latter may 'elect to rescind it,' this section, like s 75, (s 76 of the Malaysian Act) expressly confers a right to recover damages …

[54] The chronology of events soon after this public announcement shows that the plaintiff then took the only recourse it had, namely to accept the renunciation of the LOI by the defendant, and rescind the contract as evinced by the institution of this suit against the defendant seeking relief (see *Tan Hock Chan v Kho Teck Seng* [1980] 1 MLJ 308 where the Federal Court considered that notice of recission had been effected when the plaintiff had, in that suit, served the writ and statement of claim on the defendant and the defendant had accepted such a notice as effectively terminating the contract between the parties).

[55] In this civil suit however, the plaintiff seeks a declaration of specific performance or alternatively damages in lieu. Having considered the authorities it appears that the remedy available to the plaintiff here is damages or compensation for the breach or renunciation of the LOI rather than specific performance. The question that arises is how is the measure of damages to be ascertained?

[56] In *Planche v Colburn* (1831) 8 Bing 14 the plaintiff, a writer had been engaged to write a treatise for a periodical publication. The writer commenced the treatise, but before he had completed it, the defendants abandoned the periodical publication. In those circumstances it was held that the writer could sue for compensation for work done albeit without tendering or delivering the treatise, in like manner in the instant case, the plaintiff was engaged to provide STBs for the defendant subject to the passing of field or acceptance tests. The plaintiff was precluded from performing its part of its obligations by the defendant in changing, without notice, to other technology. The issue that falls for consideration is the measure of damages or compensation available to the plaintiff under s 54. Any assessment is met by the contention of the defendant that there is nothing to indicate that the plaintiff would have succeeded in passing the field tests, which was a condition to the purchase of the STBs. It therefore follows that full compensation consonant with the complete performance of the LOI is not a tenable basis. It is for this reason that I consider assessment on a quantum meruit basis, as was done in the case of *Planche v Cosburn* as the ideal basis for the assessment of damages. This case was relied upon in *Haji Hasnan v Tan Ah Kian* [1963] MLJ 175 and *Smith Construction Ltd v Phit Kirivatna (f)* [1955] MLJ 8. In the latter case, Spenser Wilkinson J explained the position thus:

> … With regards to the claim on a quantum meruit, the general rule is that it a contract is an entire one the plaintiff cannot sue until the work has been completed (*Cutter v Powell*). One of the exceptions to this general rule is where, the special contract being unperformed, a new contract has been implied from the conduct of the parties to pay remuneration commensurate with the benefit derived from partial performance …
>
> … This is the unreported case of *Lysaght v Pearson*, which is referred to in *Sumpter v Hedges*. Referring to that case, AL Smith LJ says:
>
> > There the plaintiff had contracted to erect on the defendant's land two corrugated iron roofs. When he had completed one of them, he does not seem to have said that he abandoned the contract, but merely that he would not go on unless the defendant paid him for what he had already done. The defendant thereupon proceeded to erect for himself the second roof. The Court of Appeal held that there was in that case something from which a new contract might be inferred to pay for the work done by the plaintiff.
>
> I am of opinion that from all the circumstances there must in this case be implied a contract by the defendant to pay for the work done — indeed I think it comes very near to being an express contract to this effect when the letter of 28 November 1952, part of which is quoted above, is read in the light of the various letters from the contractor to which it is a reply. Finally Mr Hume referred to a very old principle which is set out in *Emden on Building Contracts*, (4th Ed), at p 113 as follows:

It is a rule of law, which was established and well understood 200 years ago, and is laid down in Com Dig that ' … the performance of a condition snail be excused by the obstruction of the oblige; as if a condition be to build a house,and he, or another by his order, hinders his coming upon the land, or says that it shall not be built, or interrupts the performance.' If, after part performance of the work, the completion be refused or prevented by the employer, the builder may insist upon his rights under the contract or claim damages without completion and he will be entitled to recover what he has lost by the act of the defendant.

[57] I therefore conclude that the appropriate mode of assessment of the quantum of damages payable by the defendant to the plaintiff to be on a quantum meruit basis. In the course of the trial, PW1 on behalf of the plaintiff did depose in the course of evidence-in-chief on the costs it had incurred in seeking to perform its obligations under the LOI. However having perused the same it appears to this court that the sums stated in PW1's witness statements are total or composite sums which have not been fully explained. The chart produced in the plaintiff's additional bundle of documents seeking to set out the total costs incurred in the implementation and preparation for the project until the plaintiff was disabled from continuing with the project, is also in essence a summary. More significantly, PW1 has not produced any documents to expressly evidence the fact that the monies claimed were actually paid out. There is moreover no evidence relating to mitigation.

[58] The defendant did not challenge this evidence adduced by the plaintiff in the course of his testimony. Although it can be said that this may well lead to the conclusion that the court is bound to accept the evidence put forward by the plaintiff, it appears to me that the issue of damages was not fully addressed and ventilated at trial. In order to ensure that the quantum awarded to the plaintiff by way of damages is commensurate to the loss it has suffered it appears to this court that the best option would be for an order for damages to be assessed by the learned senior assistant registrar. This will enable a more realistic estimate of the actual loss suffered to be computed. The acceptance of the figures stipulated in PW1's evidence alone will not afford a complete or exhaustive analysis of the computation of damages. It would be preferable for a more accurate account to be undertaken as a separate exercise. In these circumstances I find that the plaintiff is entitled to judgment against the defendant for damages for breach of contract in that the defendant prevented the plaintiff from performing its obligations under the LOI. The plaintiff is therefore entitled to compensation from the defendant for the loss thereby suffered, which sum/quantum is to be assessed by the learned senior assistant registrar as soon as practicable. The plaintiff's claim for specific performance is not tenable and therefore dismissed. The costs of this action are to be borne by

the defendant at a sum to be decided upon the delivery of judgment after hearing submissions from learned counsel for the plaintiff and the defendant on the issue of costs.

Plaintiff's claim for damages with costs allowed.

Reported by Ashgar Ali Ali Mohamed